Order

Michigan Supreme Court
Lansing, Michigan

December 21, 2022

Elizabeth T. Clement,
Chief Justice

161612-3

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

JENNIFER JANETSKY,
Plaintiff-Appellant,

v

SC: 161612
COA: 346542
Saginaw CC: 15-028306-CL

COUNTY OF SAGINAW and CHRISTOPHER BOYD,
Defendants-Appellees,

and

SAGINAW COUNTY PROSECUTOR'S OFFICE and JOHN McCOLGAN,
Defendants.

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JENNIFER JANETSKY,
Plaintiff-Appellant,

v

SC: 161613
COA: 346565
Saginaw CC: 15-028306-CL

COUNTY OF SAGINAW, JOHN McCOLGAN, and CHRISTOPHER BOYD,
Defendants-Appellees,

and

SAGINAW COUNTY PROSECUTOR'S OFFICE,
Defendant.

_____/

On October 13, 2022, the Court heard oral argument on the application for leave to appeal the April 23, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals in part, and REMAND this case to that

court for consideration of the issues raised by defendants but not addressed by that court during its initial review.

The Court of Appeals erred by concluding that: (1) defendant Christopher Boyd is entitled to immunity from tort liability because there is no genuine issue of material fact concerning whether he acted in good faith, (2) plaintiff has not established a genuine issue of material fact that she engaged in protected activity under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., by reporting actual or suspected violations of the law, and (3) the WPA provides the exclusive remedy for plaintiff's public-policy claim.[1]

Regarding plaintiff's intentional-tort claims, a reasonable jury could conclude that Boyd's alleged conduct toward plaintiff lacked good faith and therefore he is not entitled to governmental immunity. See *Odom v Wayne Co*, 482 Mich 459, 480 (2008).[2] Plaintiff alleges that Boyd committed the intentional torts of assault/battery and false arrest/imprisonment.[3] Boyd bears the burden "to raise and prove his entitlement to governmental immunity as an affirmative defense." *Id.* at 479. Boyd argues that he acted in good faith because he believed that his actions were an appropriate exercise of supervisory authority. He cites evidence that his treatment of plaintiff was consistent with his treatment of other attorneys in his office. However, plaintiff has presented evidence that Boyd, in fact, treated her differently than other attorneys in the office, and Boyd has not conclusively rebutted that evidence. Moreover, even assuming that Boyd's alleged conduct here was consistent with his personal management style, a jury could still conclude that he did not believe in good faith that this behavior was an appropriate exercise of his supervisory authority.

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[1] With regard to the good-faith exception and plaintiff's WPA claim, a majority of the Court agrees to the holding and the rationale provided in this order. With regard to plaintiff's public-policy claim, a majority of the Court agrees that a remand to the Court of Appeals is warranted. On remand, the Court of Appeals shall assess whether plaintiff's public-policy claim is legally and factually supported.

[2] We share Chief Justice CLEMENT's skepticism as to whether the good-faith prong from *Odom* for individual governmental immunity should apply outside the context of a police officer or a public safety officer. However, we decline to consider a categorical ruling on this issue here, given that such a holding is unnecessary to resolving this case and we did not seek or obtain briefing from the parties on this larger issue.

[3] Plaintiff did not appeal the Court of Appeals' holding that defendant Saginaw County is entitled to governmental immunity on her intentional-tort claims, nor did she appeal the trial court's dismissal of her claim for intentional infliction of emotional distress. Because the Court of Appeals did not address the issue, we do not decide whether plaintiff has sufficiently alleged or created a question of fact as to whether Boyd committed assault/battery or false arrest/imprisonment.

Regarding plaintiff's WPA claim, there was sufficient evidence that she reported actual or suspected violations of the law under MCL 771.1 and MCL 780.756(3). Whether there were actual violations of the law under these statutes is not dispositive, as the WPA also protects those who report *suspected* violations of the law. Plaintiff has presented sufficient evidence to create a question of fact that she suspected the law had been violated. For example, plaintiff drafted a motion, which was signed and filed by Boyd, requesting that the trial court set aside the sentencing agreement and allow the criminal defendant to withdraw his plea because the sentencing agreement was "unlawful" under MCL 771.1. Moreover, MCL 780.756(3) does not require consultation with victims generally but rather requires it "[b]efore finalizing any negotiation that may result in a . . . plea or sentence bargain . . . ." There is no evidence that the victims here were consulted during or in anticipation of the negotiations that resulted in the plea bargain eventually finalized, and a reasonable jury could conclude that plaintiff suspected this failure to consult violated MCL 780.756(3). Since there is a question of fact as to whether plaintiff reported suspected violations of the law under MCL 771.1 and MCL 780.756(3), we decline to address whether actual violations of the law occurred.

Finally, regarding plaintiff's public-policy claim, the WPA does not provide the exclusive remedy. Plaintiff's public-policy claim is factually distinct from her WPA claim and those factual allegations do not fall within the scope of conduct covered by the WPA. Plaintiff's WPA claim is based on reports to her supervisor of actual or suspected violations of the law in the entering of a plea and sentencing agreement. By contrast, plaintiff's public-policy claim is based on her alleged refusal to violate the law—i.e., her attempt to set aside that plea and sentencing agreement. Further, the WPA governs only *reports* of violations or suspected violations of the law, and plaintiff's public-policy claim is not premised on such conduct. We express no opinion as to whether plaintiff's public-policy claim is otherwise legally or factually supported and leave that issue for further consideration on remand.

CLEMENT, C.J. (*concurring in part, concurring in the judgment in part, and dissenting in part*)

I largely agree with the result the Court reaches today (albeit with one disagreement), and I join the reasoning of some portions of it.

First, as to plaintiff's intentional-tort claims, I join in full the Court's holding that "a reasonable jury could conclude that Boyd's alleged conduct toward plaintiff lacked good faith and therefore he is not entitled to governmental immunity." Indeed, I would go further. I do not believe the "good faith" standard we have used for the intentional torts of governmental employees is applicable in circumstances like these. We discussed this standard at some length in *Odom v Wayne Co*, 482 Mich 459, 473-475 (2008), but I believe in context it only properly applies to public officers who, because of their office, are

authorized to commit acts that *would* be tortious if a private actor committed them. The cases cited in *Odom*—as well as *Odom* itself—are almost all cases involving suits against police officers or other public safety officials. And, by virtue of their office, these officials have a broader license to perform acts that would be torts if a private actor did them—but only if the official does them in good faith. Thus, as we held in *Firestone v Rice*, 71 Mich 377, 384 (1888), "[t]here must be some discretion reposed in a sheriff or other officer, making an arrest for felony, as to the means taken to apprehend the supposed offender," the propriety of which should not "be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity." Here, nothing about the nature of the office of an assistant prosecutor gives the officeholder a license to commit intentional torts such as those alleged in this case against coworkers, and I therefore think that the "good faith" standard from *Odom* is simply inapplicable. That said, we have not had occasion to recognize this distinction before, so I do not fault the majority for relying on the *Odom* "good faith" standard in the instant case.

As to plaintiff's claims under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., I mostly agree with the result reached by the Court—resuscitating her WPA claim—although I disagree with its reasoning. The Court holds that "there was sufficient evidence that [plaintiff] reported actual or suspected violations of the law" because "[w]hether there were actual violations of the law under these statutes is not dispositive, as the WPA also protects those who report *suspected* violations of the law." This Court has never held this before, and in fact expressly declined to make such a holding in *Debano-Griffin v Lake Co*, 486 Mich 938 (2010). I think making such a holding today is misguided. The statute defines as protected activity a report of "a violation or a suspected violation of a law," MCL 15.362, but it does *not* protect reporting a suspected violation of a *suspected* law. In other words, while the statute accepts uncertainty—a violation need only be *suspected* to be reportable and protected—this should be construed as *factual* uncertainty, not *legal* uncertainty. In other words, for a plaintiff to make a report that qualifies for WPA protection, the plaintiff need not know with certainty that the activity reported actually *occurred*, but the plaintiff *does* need to demonstrate that *if* those facts actually occurred, they would *definitely* be a violation of the law. To hold otherwise would allow plaintiffs to receive protection for reporting violations of imaginary laws, which I do not think the WPA contemplates—even if a reasonable person might believe such a law exists. To the extent it holds to the contrary, I disagree with *Melchi v Burns Int'l Security Servs, Inc*, 597 F Supp 575 (ED Mich, 1984), and it is not binding on this Court in any event.

As a result, I do not think this Court can avoid deciding whether the facts alleged by plaintiff would qualify as a violation of the law. She alleges that she reported to her superiors violations of MCL 780.756(3) and MCL 711.1(1). I agree with the outcome reached by the Court of resuscitating her WPA claim under MCL 780.756(3) because I believe what plaintiff alleges qualifies as a violation of the statute. It provides:

> Before finalizing any negotiation that may result in a dismissal, plea

> or sentence bargain, . . . the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the victim's views about the disposition of the prosecution for the crime, including the victim's views about dismissal, plea or sentence negotiations . . . .

In this case, as it happens, the facts are essentially undisputed. While plaintiff was on honeymoon her supervisor entered into a plea agreement with a criminal defendant to plead the charges he faced for first-degree criminal sexual conduct (CSC) down to CSC-III and be sentenced to time in the county jail and probation. Her supervisor did not consult with the victim about this precise plea offer, but was aware that the victim would be opposed to the offer as the result of prior contact between the prosecutor's office and the victim. Plaintiff reported this lack of consultation to the county prosecutor, and she alleges that she has been retaliated against as a result.

Defendant argues that plaintiff's supervisor satisfied the statute—the victim was given an opportunity to consult, and that opportunity occurred before the plea was finalized. I believe we must decide whether or not this conduct satisfied the statute, rather than simply concluding that a reasonable person *could* conclude that it did not satisfy the statute. That said, I concur in the result of resuscitating plaintiff's WPA case under MCL 780.756(3) because I do not believe this is the consultation the statute contemplates. The statute requires that the prosecutor give the victim an opportunity to consult with the prosecutor over "the victim's views about dismissal, plea or sentence negotiations," but to offer any sort of knowledgeable or informed consultation, the plea negotiations would need to be far enough along that the victim is reacting to an actual offer. Any other rule would essentially punish victims who have clear, categorical preferences—e.g., "no pleas," or "defendant must go to prison"—by relieving the prosecutor of the obligation to consult under the statute once those preferences are communicated.[4] I believe the facts that plaintiff reported qualify as a violation of MCL 780.756(3).

On the other hand, I dissent from the Court's decision to resuscitate plaintiff's WPA claim under MCL 771.1(1). That statute allows a court to "place the defendant on probation," but only in "prosecutions for felonies . . . *other than* . . . criminal sexual conduct in the first or third degree[.]" Plaintiff alleges that this statute was violated in that

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[4] I disagree with Justice ZAHRA's assertion that MCL 780.756(3) "simply requires that the victim of a crime be given the opportunity to express his or her views on the disposition of the prosecution before any negotiations are finalized." The Legislature's choice of the word "finalize" is important. It is defined as "[t]o put into final form; complete." *The American Heritage Dictionary of the English Language* (5th ed). It seems apparent to me that what the Legislature contemplated was that finalization was the *only* thing that remained to be done—i.e., that the negotiations were far enough along that all that remained was to put the plea "into final form."

the defendant in the underlying criminal case was convicted of CSC-III but negotiated a sentence that included probation. However, the WPA only protects an employee who "reports or is about to report . . . a violation or a suspected violation of a law[.]" MCL 15.362. I do not think a defective criminal sentence is susceptible to being "reported." While exactly what qualifies as a "report" is a disputed issue that this Court is going to be taking up in the coming months, see *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, ___ Mich ___ (2022) (Docket Nos. 161678 and 164302), regardless of the interpretation we arrive at for "report" I do not think it encompasses matters of public record, which this plea bargain was. The public is charged with constructive notice of the contents of these judgments, and I do not see how we can say that plaintiff "reported" something to the county prosecutor that he already is treated as having full knowledge of. Undoubtedly, the Michigan Compiled Laws have any number of obscure legal requirements that we are all still bound to follow because they are published in the books and we have constructive notice of them. The same principle applies here.

All that said, I concur with the Court's resuscitating plaintiff's common-law claim for termination in violation of public policy, because I believe that MCL 771.1(1) is the basis for that claim for essentially the converse of the reasons that it cannot be the basis of a claim under the WPA. Because I do not believe that a violation of MCL 771.1(1) is susceptible to being "reported," the WPA does not protect plaintiff's communications regarding MCL 771.1(1) and therefore it cannot provide an exclusive remedy where it provides no remedy at all. But that does not change the reality that MCL 771.1(1) is a formal legislative expression of the state's public policy, which it presumably prefers to see obeyed. To the extent that plaintiff can demonstrate that defendants retaliated against her as a result of her efforts to bring the underlying criminal prosecution into compliance with MCL 771.1(1), I believe that should give rise to a common-law claim for termination in violation of public policy as was recognized in *Suchodolski v Mich Consol Gas Co*, 412 Mich 692 (1982).

As with MCL 780.756(3), I believe plaintiff is obliged to demonstrate that MCL 771.1(1) was actually violated to support her common-law claim, and not merely that her interpretation of the statute as having been violated is reasonable. That said, I believe that plaintiff has identified an actual violation of the statute. Defendants argue that the statute only prohibits *exclusively* probationary sentences, citing *People v Gutierrez*, unpublished per curiam opinion of the Court of Appeals, issued December 23, 2014 (Docket No. 317593), but that is not what the statute says or what *Gutierrez* holds. The statute says that "the court may place the defendant on probation" for criminal prosecutions "other than . . . criminal sexual conduct in the first or third degree." The defendant in the underlying criminal matter was convicted of CSC-III, and therefore his conviction was not eligible for probation. *Gutierrez* does not hold to the contrary. In *Gutierrez*, the trial court misconstrued MCL 771.1(1) as requiring that an individual convicted of CSC-III be sentenced to *prison*. The Court of Appeals held that this was wrong and that CSC-III defendants remain eligible for intermediate sanctions under MCL 769.34(4). While

probation is *one* such intermediate sanction, it is not the only one. While the Court of Appeals held in *Gutierrez* that the defendant there did not necessarily have to be sentenced to prison and remained eligible for intermediate sanctions, it does not follow from that conclusion that any portion of a CSC-III defendant's sentence can include probation. I believe the sentence agreement that plaintiff's supervisor entered into violated MCL 771.1(1), and while that violation is not susceptible to being "reported" under the WPA, plaintiff's efforts to bring the prosecution into compliance with the law are a proper basis for a common-law claim for termination in violation of public policy if she can prove that she was retaliated against due to her efforts at achieving that compliance.

In short, then, I agree in full with the Court's decision to resuscitate plaintiff's intentional-tort claims, although I would add that I do not believe the "good faith" standard from *Odom* properly applies under these circumstances. I further agree with the result of resuscitating plaintiff's WPA claim under MCL 780.756(3), because I believe she has identified an actual violation of that statute which she alleges she was retaliated against for reporting. I dissent from the decision to resuscitate plaintiff's WPA claim premised on MCL 771.1(1), because I do not believe violations of that statute are susceptible to being "reported," as court judgments are matters of public record. That said, precisely because violations of MCL 771.1(1) are not susceptible to being "reported" under the WPA, the WPA provides no remedy and cannot preempt a common-law claim for termination in violation of public policy premised on plaintiff's efforts to achieve compliance with MCL 771.1(1). Because MCL 771.1(1) is an expression of the state's public policy, I do believe that it is a legitimate basis for plaintiff's claim that she was terminated in violation of that public policy when she alleges that she was retaliated against for seeking to achieve compliance with the statute.[5] With these corrections to the decisions of the Court of Appeals, I of course concur with the Court's decision to remand to the Court of Appeals to consider the issues it did not reach (such as whether plaintiff's claims are not viable because they are time-barred).

ZAHRA, J. (*concurring in part and dissenting in part*)

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[5] I disagree with Justice ZAHRA that for a common-law claim under *Suchodolski*, "there must actually be a violation of the law or, at the very least, a request from an employer that the plaintiff-employee violate the law and that the plaintiff failed or refused to do so." What this Court recognized is that "[t]he courts have also occasionally found sufficient legislative expression of policy to imply a cause of action for wrongful termination even in the absence of an explicit prohibition on retaliatory discharges." *Suchdolski*, 412 Mich at 695. The focus is on the "legislative expression of policy." I think there is little reason to treat an employer's direct request to an employee to violate a law differently from an employee's efforts to achieve compliance with the law; in both circumstances, obedience to the state's public policy is at issue, and a retaliatory discharge undermines that public policy.

I concur with the majority's holding that the Court of Appeals erred by holding that defendant Christopher Boyd is entitled to governmental immunity from tort liability. I dissent, however, from the remainder of the majority's order sustaining plaintiff's claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, and her public-policy claim. In short, plaintiff did not communicate "a violation or a suspected violation of a law" to a public body for purposes of the WPA. Plaintiff also cannot show that she failed or refused to violate a law such that her employer's alleged retaliation against her, leading to her purported constructive discharge, was in violation of public policy. Because both plaintiff's WPA and public-policy claims lack merit, I would affirm the Court of Appeals' dismissal of those two claims.

The WPA provides, in pertinent part:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state . . . to a public body, unless the employee knows that the report is false . . . .[6]

To survive summary disposition, a plaintiff raising a WPA claim must first establish a prima facie case that "(1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action."[7] Plaintiff alleges that she engaged in protected activity under the WPA when she reported to Saginaw County Prosecuting Attorney John McColgan an "unlawful" plea deal that Boyd, the Chief Assistant Prosecuting Attorney and plaintiff's immediate supervisor, negotiated in a 2013 sexual assault case while plaintiff was away on her honeymoon. The plea deal provided that the criminal defendant would plead guilty to one count of third-degree criminal sexual conduct (CSC-III)[8] in exchange for the dismissal of several other charges and a sentencing recommendation of one-year in jail followed by probation. Plaintiff consulted with the victims of the 2013 sexual assault case and obtained their views on a potential disposition of the charges and sentences before she left. Boyd, knowing the victims' views from plaintiff's earlier consultation, did not consult with the victims again before finalizing the plea deal at issue.

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[6] MCL 15.362.

[7] *Pace v Edel-Harrelson*, 499 Mich 1, 6 (2016) (quotation marks and citation omitted).

[8] MCL 750.520d.

Plaintiff first claims that Boyd's failure to consult with the victims before finalizing the plea deal violated MCL 780.756(3) of the Crime Victim's Rights Act, MCL 780.751 *et seq*., which provides:

> Before finalizing any negotiation that may result in a dismissal, plea or sentence bargain, or pretrial diversion, the prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the victim's views about the disposition of the prosecution for the crime, including the victim's views about dismissal, plea or sentence negotiations, and pretrial diversion programs.

Contrary to plaintiff's argument, she did not communicate to McColgan "a violation or a suspected violation" of MCL 780.756(3) for purposes of the WPA. That provision simply requires that the victim of a crime be given the opportunity to express his or her views on the disposition of the prosecution before any negotiations are finalized.[9] Plaintiff concedes that she consulted with the victims and obtained their views about plea and sentencing negotiations before she left for her honeymoon. And the record demonstrates that Boyd was aware of the victims' views before he finalized the plea deal. Therefore, MCL 780.756(3) was satisfied and no actual violation of law occurred.

Further, while plaintiff may have believed Boyd's decision not to consult with the victims before finalizing the plea deal amounted to a violation of MCL 780.756(3), her belief was not reasonable and, thus, does not amount to "a suspected violation

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[9] Chief Justice CLEMENT focuses on the Legislature's use of the word "finaliz[e]" to conclude that it is "apparent" the consultation with a victim required under the Crime Victim's Rights Act must occur when "finalization [of a plea is] the *only* thing that remain[s] to be done[.]" To reach this conclusion, Chief Justice CLEMENT must inject into the statute an immediacy requirement that is nowhere to be found in its language. The sum and substance of the statute is clear. It states, "[T]he prosecuting attorney shall offer the victim the opportunity to consult with the [prosecutor]" before finalizing a plea negotiation. MCL 780.756(3). The word "before" simply means that an action occurs earlier in time than one or more other actions. See *Merriam-Webster's Collegiate Dictionary* (11th ed) ("earlier than the time that"); *The American Heritage Dictionary of the English Language* (5th ed) ("[i]n advance of the time when"). In other words, as long as the prosecuting attorney consults with the victim in advance of the time when negotiations are finalized, the statute is satisfied. If that consultation occurs after negotiations are finalized, the statute is violated. Because the victims were consulted with before the plea was finalized, the requirements of the Crime Victim's Rights Act were satisfied.

of . . . law."[10] Plaintiff was an experienced prosecutor whose job it was to know the requirements of MCL 780.756(3). Thus, plaintiff should have been aware that her earlier consultation with the victims satisfied the statute. Plaintiff's belief that Boyd's decision not to consult the victims again before finalizing the plea deal amounted to "a suspected violation" of the statute, even if in good faith, was not reasonable. Therefore, her communication to McColgan regarding MCL 780.756(3) was not protected activity under the WPA.

Next, plaintiff alleges that Boyd's plea deal violated MCL 771.1(1), which prohibits a trial court from placing a criminal defendant convicted of CSC-III on probation.[11] Contrary to plaintiff's argument, she did not communicate to McColgan "a violation or a suspected violation of" MCL 771.1(1) for purposes of the WPA. As an initial matter, the statute does not expressly prohibit a sentence that combines jail time and probation. Even if it did, the question is whether *Boyd* can be said to have violated MCL 771.1(1) when he agreed, as part of the plea deal in the 2013 sexual assault case, to recommend a mixed jail-

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[10] Although this Court has never addressed the standard for when a plaintiff reports "a suspected violation of the law" under the WPA, other courts have determined that "[t]he suspected violation of the law is judged on a subjectively reasonable standard: the employee must have been acting in good faith and been subjectively reasonable in the belief that the conduct was a violation of the law." *Smith v Gentiva Health Servs (USA) Inc*, 296 F Supp 2d 758, 762 (ED Mich, 2003), citing *Melchi v Burns Int'l Security Servs, Inc*, 597 F Supp 575, 583 (ED Mich, 1984) (stating that "the Michigan legislature, by using the term 'suspected violations,' meant to bring within the [WPA's] protections an employee's subjective good faith belief that he was reporting a violation of the law"). Decisions of intermediary federal courts are not binding on this Court but may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607 (2004). Further, the model jury instruction states that a plaintiff "must reasonably believe that a violation of law or a regulation has occurred" and that "the employee cannot have a reasonable belief if [he / she] knows [his / her] report is false." M Civ JI 107.04.

[11] MCL 771.1(1) provides:

> In all prosecutions for felonies, misdemeanors, or ordinance violations other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer.

time and probation sentence for a CSC-III conviction. As the Court of Appeals correctly observed below, it is the trial court's responsibility to sentence a criminal defendant, not the prosecutor's, and a plea agreement and sentencing recommendation does not bind a sentencing judge.[12] Put simply, MCL 771.1(1) constrains what *the sentencing court* may impose as a sentence, it does not constrain what *the prosecutor* may offer as a sentencing recommendation to a plea agreement. Nothing in the language of MCL 771.1(1) supports plaintiff's argument that a prosecutor offering or agreeing to a plea deal that recommends an allegedly invalid sentence constitutes "a violation . . . of a law" for purposes of the WPA. Nor was it reasonable for plaintiff—an experienced prosecutor whose job it was to know the respective roles of the prosecution and the trial court in handling a criminal case—to believe that "a suspected violation" of MCL 771.1(1) had occurred.

Further, it is important to emphasize that the alleged violation or suspected violation of law at issue is not the plea deal itself; rather, it is the sentence that *would have been imposed if* the trial court had agreed with Boyd's sentencing recommendation that plaintiff claims she reported to McColgan as a violation or suspected violation of MCL 771.1(1). This Court has explained that the WPA only contemplates an existing act or conduct that has occurred or is ongoing; it does not contemplate a future, planned, or anticipated act or conduct that may or may not occur.[13] A sentence cannot be deemed invalid or unlawful unless and until it is imposed by the trial court.[14] Because the allegedly unlawful sentence

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[12] *Janetsky v Saginaw Co*, unpublished per curiam opinion of the Court of Appeals, issued April 23, 2020 (Docket Nos. 346542 and 346565), p 8, citing *People v Cobbs*, 443 Mich 276, 282 (1993) and *People v Killebrew*, 416 Mich 189, 208 (1982).

[13] *Pace*, 499 Mich at 7-8.

[14] Indeed, facts and circumstances bearing on a criminal defendant's sentence often change between a plea hearing and sentencing. For example, errors in preliminary scorings of a defendant's prior record variables or offense variables are often uncovered in preparation for sentencing, and parties frequently disagree about the scoring of those variables at sentencing. These changes and disagreements affect the defendant's guidelines minimum sentence range. Further, mandatory minimum sentences may be found to be applicable (or not) after a plea deal is entered. Thus, as any attorney practicing criminal law well knows, the prospective sentence that a criminal defendant might receive based on an initial review of the case may be quite different than the sentence ultimately imposed. But it is not until the trial court imposes the sentence that a defendant may appeal or move for relief from judgment on the ground that the sentence is invalid or unlawful. It is simply unfathomable to conclude that plaintiff, an experienced prosecutor, could have reasonably believed that Boyd, a prosecutor with no authority to impose a criminal sentence, violated or was suspected to have violated MCL 771.1(1) by merely agreeing to recommend a sentence not yet imposed by the trial court.

was never imposed, the acts or conduct underlying the violation or suspected violation of law never occurred. Accordingly, when plaintiff informed McColgan of the terms of Boyd's plea deal, she had communicated, at most, what she believed was an *anticipated* violation of MCL 771.1(1)—i.e., that the criminal defendant's mixed jail-time and probation sentence, if imposed by the trial court, would violate MCL 771.1(1). Therefore, plaintiff did not engage in protected activity for purposes of the WPA.[15]

Finally, plaintiff contends that she has a viable public-policy claim based on her failure or refusal to violate MCL 771.1(1). Plaintiff argues that her refusal to allow the plea deal to stand despite intense pressure from Boyd, together with her insistence on filing a motion to set aside the sentencing agreement, led to Boyd retaliating against her and to her constructive discharge.[16] In order to assert a public-policy claim under the failure-or-refusal-to-violate-the-law exception to at-will employment set forth in *Suchodolski v Mich Consol Gas Co*,[17] there must actually be a violation of the law or, at the very least, a request from an employer that the plaintiff-employee violate the law and that the plaintiff failed or refused to do so.[18] Here, there was no law that plaintiff could have possibly been asked to

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[15] It is inconsequential that Boyd signed the motion to set aside the sentencing agreement, which stated that "the sentencing agreement contemplated by the parties is unlawful and cannot be imposed by any court." Again, only a trial court can impose a criminal sentence, and it is undisputed that the mixed jail-time and probation sentence was never imposed. Like plaintiff's communication to McColgan, the motion to set aside the sentencing agreement contemplated, at most, an anticipated violation of MCL 771.1(1).

[16] " 'Constructive discharge is not in itself a cause of action' but, rather, 'a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily.' " *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 471 (2020), quoting *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487 (1994). "A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." *Jewett*, 332 Mich App at 471 (quotation marks and citations omitted).

[17] *Suchodolski v Mich Consol Gas Co*, 412 Mich 692 (1982).

[18] *Id*. at 695 ("[A] cause of action has been found to be implied where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment."), citing *Trombetta v Detroit, T & I R Co*, 81 Mich App 489 (1978) (sustaining a public-policy claim of an employee who was discharged refusing to manipulate and adjust pollution-control reports).

violate. Again, MCL 771.1(1) prohibits *a trial court* from imposing probation for a CSC-III conviction. Even if MCL 771.1(1) prohibited the mixed jail-time and probation sentence at issue, because such a sentence was never imposed, MCL 771.1(1) was not violated. Moreover, plaintiff and Boyd, as prosecuting attorneys, could not violate MCL 771.1(1). Therefore, Boyd could not request that plaintiff violate MCL 771.1(1), nor could he retaliate against her for failing or refusing to violate a statute that she could not actually violate.[19] Accordingly, plaintiff's public-policy claim under *Suchodolski*'s failure-or-refusal-to-violate-the-law exception lacks merit, and a remand to the Court of Appeals on this issue is futile.

In sum, plaintiff's WPA claim fails because she did not communicate "a violation or a suspected violation" of MCL 780.756(3) or MCL 771.1(1) to a public body for purposes of the WPA. Her public-policy claim also fails because she did not fail or refuse to violate MCL 771.1(1). I would therefore affirm the Court of Appeals' dismissal of these claims. Because a majority of this Court keeps these meritless claims alive, I dissent.

VIVIANO, J., joins the statement of ZAHRA, J.

WELCH, J. (*dissenting in part*)

I agree with the majority that the Court of Appeals committed an error requiring reversal because genuine issues of material fact remain as to whether (1) defendant Christopher Boyd acted in good faith and thus is entitled to immunity for tort liability and (2) plaintiff engaged in protected activity under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., by reporting actual or suspected violations of the law. I write separately because I agree with the Court of Appeals' conclusion that the WPA provides the exclusive remedy for plaintiff's public-policy claim. Plaintiff's public-policy claim arises out of the same facts that are the basis for her WPA claim. Further, since she works

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Chief Justice CLEMENT believes plaintiff has a valid public-policy claim under *Suchodolski* because plaintiff's efforts of achieving compliance with the law are no different, and entitled to no less protection, than if her employer had made a direct request for her to violate the law. Not only would this be a remarkably broad expansion of *Suchodolski*'s failure-or-refusal-to-violate-the-law exception, Chief Justice CLEMENT ignores the reality that plaintiff's complaint does not advance such a novel theory; instead, plaintiff only contends that she was retaliated against for failing or refusing to violate the law and that this retaliation lead to her constructive discharge.

[19] See *Stegall v Resource Tech Corp*, ___ Mich ___, ___ (2022) (Docket No. 160495) ("[I]t boggles the mind to think that an employee could have failed or refused to violate the law—or acquiesced in its violation, in plaintiff's telling—when there was no actual violation of the law.") (ZAHRA, J., dissenting); slip op at 7 n 19.

for a public-sector employer who is a "public body" under the WPA, any concerns she raised with her employer are covered by the WPA. As a result, I believe her public-policy claims are preempted by the WPA.

Plaintiff asserts that her claim of unlawful retaliation under the WPA and her unlawful constructive discharge in violation of Michigan's public policy, pursuant to *Suchodolski v Mich Consol Gas Co*, 412 Mich 692 (1982), are separate claims arising out of different facts. Plaintiff argues that her public-policy claim arises out of her refusal to participate in her supervisor Boyd's alleged illegal actions when he pressured her not to file a motion to vacate what she perceived to be an illegal guilty plea and sentencing agreement Boyd had entered into with the criminal defendant. Although normally at-will employment relationships may be terminated with or without cause, an exception exists when "discharging an employee [is] so contrary to public policy as to be actionable." *Suchodolski*, 412 Mich at 695. Public-policy claims include adverse employment actions in response to an employee's "refusal to violate a law in the course of employment" or in response to the employee's "exercise of a right conferred by a well-established legislative enactment." *Id*. at 695-696. But "[a] public policy claim is sustainable . . . only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue." *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 80 (1993), disapproved of on other grounds by *Brown v Detroit Mayor*, 478 Mich 589 (2007). The WPA is the exclusive remedy for an employee whose employment is terminated in retaliation for reporting an employer's violation of the law. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 383 (1997).

In this case, plaintiff's public-policy claim relies on the same underlying facts as her WPA claim. While plaintiff argues that her complaint about the suspected violation of MCL 771.1 is separate from her efforts to correct the guilty-plea agreement and pressure she allegedly received from Boyd not to file the corrective motion, the facts are not legally distinctive. Both claims spring from plaintiff's belief that the plea deal and sentencing agreement were illegal, a concern that she allegedly reported and attempted to rectify. Stated differently, given that plaintiff had already reported her concerns that Boyd violated MCL 771.1, her attempt to vacate what she suspected was an illegal guilty plea and sentencing agreement is part of the same chain of events that she alleges give rise to that part of her WPA claim.

Furthermore, even if the sequence of events can be parsed and separated into factually distinct matters, plaintiff was communicating with management as part of her efforts to rectify the perceived problems with the plea. The WPA provides retaliation protection to employees who report actual or suspected violations of the law to a "public body." MCL 15.362. Defendant Saginaw County is a "public body" as defined by MCL 15.361(d)(*iii*). Therefore, any separate action by plaintiff under the alleged facts would also be covered by the WPA given her communication with office management. Thus, whether the facts related to her efforts to file a motion to vacate the plea agreement are

related to her initial complaint about the plea agreement or not, the WPA covers both scenarios and provides her the exclusive remedy for the alleged retaliatory discharge. *Dolan*, 454 Mich at 382-383.

For these reasons, I respectfully dissent from the majority's decision to reverse the Court of Appeals' holding that plaintiff's public-policy claim was preempted by the WPA. In all other respects, I join the majority's order.